



State of New Hampshire  
DEPARTMENT OF ENVIRONMENTAL SERVICES

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(603) 271-3503 · FAX (603) 271-2867



R. L. Spencer, Inc.  
222 Highbridge Street  
Fayetteville, NY 13066

Attn: Richard J. Bruno, Jr.

Re: Home Depot Construction  
Rochester, NH

NOTICE OF PROPOSED  
ADMINISTRATIVE FINE  
No. AF 02-003

February 14, 2002

### I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("Division") to R. L. Spencer, Inc. pursuant to RSA 482-A:13 and Env-C 601.05. The Division is proposing that fines totaling \$27,500 be imposed against R. L. Spencer, Inc. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

### II. Parties

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. R. L. Spencer, Inc. ("R. L. Spencer") is a New York corporation having a mailing address of 222 Highbridge Street, Fayetteville, NY 13066, Attn: Richard J. Bruno, Jr. The corporate registration for New Hampshire is still pending.

### III. Summary of Facts and Law Supporting Claim(s)

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in or on any bank, flat, marsh, wetland or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES ("Commissioner") has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, the Commissioner has adopted Env-Ws 415 to implement this program.
4. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of, *inter alia*, RSA 485-A:17, Env-Ws 415, or any permit issued pursuant thereto. Pursuant to RSA 485-A:22, V, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.

5. Pursuant to RSA 485-A:13 and related sections, DES regulates the discharge of pollutants to surface waters through a permit program. As part of this program, the Commissioner has adopted Env-Ws 401 - 405 relating to permits and has adopted Env-Ws 1700 to establish water quality standards for the State's waters.
6. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations relating to the discharge of pollutants to surface waters and the water quality standards. Pursuant to this section, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.
7. RSA 485-A:17 requires any person who proposes to significantly alter the terrain to obtain a permit from DES prior to initiating the work.
8. Env-Ws 415.02(y) defines significantly altering terrain to include disturbing more than 100,000 sq.ft. of contiguous area.
9. Env-Ws 415.09(i) and (k) require that temporary and permanent methods for preventing soil erosion and controlling runoff be employed during earth moving activities.
10. Env-Ws 415.09(j) requires construction phasing and sequencing, including methods for limiting the length of time of exposure of unstabilized soils.
11. Home Depot USA, Inc. ("Home Depot") is the owner of property located at 290 North Main Street, Rochester, NH identified as Lot 29-1, Map/Block 115 of the Rochester tax records ("Property").
12. On May 10, 2000, DES issued Alteration of Terrain/Site Specific Permit WPS-5582 ("Permit") under RSA 485-A:17 to WE Rochester, LLC for the construction of a Home Depot retail store on the Property. The Permit includes seven specific permit conditions, which include in relevant part the following:
  - a. Condition # "Water quality degradation shall not occur as a result of the project."
  - b. Condition # 2: "Revised plans shall be submitted for permit amendment prior to any changes in construction details or sequences. [DES] must be notified in writing within ten days of a change in ownership."
  - c. Condition # 3: "[DES] must be notified in writing prior to the start of construction.
  - d. Condition # 4: "The approved plans and supporting documentation in the project file are a part of this approval."
13. The construction sequence on plans prepared by HSI Hayner/Swanson, Inc. dated February 1, 2000, Sheet 24 of 29, specifies the order in which construction work was to occur. The 13 construction sequence items include in relevant part the following:
  - a. Item # 5: "Construct stormwater detention basin. Construct stone check dam and stabilize side slopes at stormwater detention basin.

b. Item # 6: "Perform earthwork operations and building pad preparation. All cut and fill slopes shall be seeded and mulched within 72 hours after being constructed. Temporary graded areas should be stabilized by October 1<sup>st</sup>, so as not be left exposed during winter months."

c. Item # 7: "Installation of underground utilities and catch basins shall be protected from sediment in accordance with the 'sediment control at catch basin detail'... All permanent stormwater management measures shall have a healthy stand of vegetation established prior to directing runoff into them."

d. Item # 10: "Final paving of roads and parking areas"

14. Sheet 24 of 29 also contains six Construction Notes. Item #1 of the Notes states: "All soil erosion and sediment control measures to be in accordance with standards and specifications thereof in 'Stormwater Management and Erosion and Sediment Control Handbook for Urban and Developing Areas of New Hampshire', August 1992, prepared by NHDES and RCCD in cooperation with USDA-SCS [("Handbook")]."

15. Chapter 7 of the Handbook specifies Best Management Practices for Stormwater Management and Erosion and Sediment Control ("BMPs") which includes sedimentation and stormwater detention basins, slope stabilization and siltation controls.

16. Item # 2 of the Notes on sheet 24 of 29 states: "The work area shall be graded, shaped, and otherwise drained in such a manner as to minimize soil erosion, siltation of drainage channels, damage to existing vegetation, and damage to property outside the limits of the work area. Silt fences, hay bales and/or detention basins will be necessary to accomplish this end."

17. On June 18, 2001, DES received notification of turbid water observed in a wetland abutting the Cocheco River. Division personnel responded to the notification and inspected the site. The inspection revealed that turbid water was being pumped from a detention basin located on the Property through a pipe into wetlands hydrologically connected with the Cocheco River ("the Wetlands").

18. On June 18, 2001, at approximately 2:00 p.m., Division personnel notified Mark Ingraham, Site Superintendent of R. L. Spencer, General Contractor for Home Depot, of the violation and requested that R. L. Spencer cease pumping operations. Mr. Ingraham complied with the request and ceased pumping activities at approximately 2:05 p.m.

19. The incident was documented by Division personnel through field notes, photographs, and sampling of the turbid water in the Wetlands. Three water samples were collected by Division personnel for turbidity testing. The water samples were collected at three separate locations: the point of discharge, approximately 20 feet upstream from the point of discharge, and approximately 20 feet downstream from the point of discharge. Samples designated as upstream and downstream were not indicative of the flow through the Wetlands but were designated with reference to the direction of flow in the Cocheco River. This designation was established due to the lack of flow exhibited in the Wetlands (*i.e.*, water in the Wetlands did not appear to have a definitive flow pattern other than away from the point of discharge). Because the entire Wetlands was inundated with turbid water from the Property, a sample representative of background turbidity levels could not be obtained.

20. On June 20, 2001, the Division received the results of the turbidity testing on the water samples collected on June 18, 2001, which showed the following (measurements in Nephelometric Turbidity Units ("NTUs")):

- Source of discharge: 700 NTUs;
- b. Upstream of discharge: 165 NTUs;
- c. Downstream of discharge: 174 NTUs.

21. On June 28, 2001, Division personnel again inspected the Wetlands and the Property. During the inspection of the Wetlands, a water sample was collected in approximately the same location as the "upstream" water sample collected on June 18, 2001. This water sample was collected for purposes of evaluating background turbidity levels. After the inspection of the Wetlands was completed, Division personnel inspected the Property. The inspection revealed the following:

- a. Stormwater runoff was being directed to the unstabilized detention basin; and
- b. Silt fencing was not installed along the southeast portion of the Property adjacent to Twombly Street. This area was unstabilized and sloped down toward undisturbed vegetation.

22. On July 1, 2001, the Division received turbidity results for the sample collected on June 28, 2001. Test results indicated a background turbidity level of 8.8 NTUs.

23. On July 7, 2001, Division personnel spoke via telephone with Mr. Greg Sullivan of WE Rochester, LLC, holder of the Permit for the Property. Mr. Sullivan indicated that ownership of the Property had been transferred "months ago" to Home Depot.

24. A check of the City of Rochester's tax records showed that the Property was transferred to Home Depot on December 19, 2000.

25. Env-Ws 415.18 requires a new property owner to notify DES within 10 days of the change in ownership by providing certain information as specified therein.

26. On July 7, 2001, Division personnel received a facsimile from Corporate Counsel for Home Depot indicating that Home Depot is the owner of the Property.

27. On July 7, 2001, Division personnel spoke with Mr. Ingraham of R. L. Spencer via telephone. When asked how long the pumping of turbid water from the detention basin, observed on June 18, 2000, had been going on, Mr. Ingraham indicated from 4:30 a.m. on June 18, 2001 to approximately 2:00 p.m. on June 18, 2001 when Division personnel arrived and requested that the pumping cease.

28. On August 6, 2001, DES issued Administrative Order No. WD 01-30 ("Order") to Home Depot requiring the following:

- a. Within 5 days of the Order, stabilize the detention basin on the Property.

- b. Within 5 days of the Order, install all necessary erosion and sediment controls at the Property in accordance with the Permit.
  - c. Within 20 days of the Order, submit a restoration plan prepared by a certified wetland scientist to DES for review and approval.
29. On August 16, 2001, Division personnel inspected the Property and found the following:
- a. The detention basin side slopes and base bottom were not stabilized.
  - b. The sediment forebay and detention basin contained accumulated sediment requiring removal.
  - c. The siltation fencing on the southern edge of the Property had not been maintained, three areas of siltation fencing had failed, and sediment had accumulated behind it.
30. During the August 16, 2001 inspection, Division personnel met with Mr. Ingraham and discussed the continuing violations of the Order and emphasized the importance of timely compliance.
3. On September 11, 2001, Division personnel inspected the Property and found the following:
- a. The detention basin was not stabilized.
  - b. Jute matting was not placed on the side slopes.
  - c. No hydroseeding had taken place.
  - d. Erosion along the side slopes of the detention basin had occurred in numerous areas.
  - e. The bottom of the basin had only achieved sparse vegetation.
  - f. Approximately 2-4 inches of standing water covered approximately 50% of the detention basin.
  - g. Siltation fencing was not being maintained.
  - h. The Home Depot store was open for business.
32. Surface water runoff from the Property flowed into the Wetlands, a surface water of the state.
33. Chapter 210, VI of the Laws of 1951 classified the Wetlands as a Class B water.
34. Env-Ws 1703.11(b) states that the turbidity in Class B waters shall not exceed naturally occurring conditions by more than 10 NTUs.
35. RSA 485-A:13 states that it shall be unlawful for any person or persons to discharge or

dispose of any sewage or waste to the surface or groundwater of the state without first obtaining a permit from DES.

36. Sediment-laden water constitutes waste as defined under RSA 485-A.

37. Env-C 603.08(a) authorizes a fine of \$2,000 per calendar month or portion thereof "[f]or failing to comply with the requirements of an administrative order issued pursuant to RSA 485-A:22".

38. Env-C 603.08(c) authorizes a fine of \$2,000 per violation "[f]or violating any surface water quality standard specified in RSA 485-A:8, Env-Ws 430, or Env-Ws 1700."

#### **IV. Violations Alleged and Proposed Administrative Fines**

1. R. L. Spencer has violated RSA 485-A:17 and Condition #4 of the Permit by failing to complete all work in accordance with plans prepared by HSI Hayner/Swanson, Inc. dated February 1, 2000. Specifically, R. L. Spencer failed to meet items 5, 6, and 7 of the construction sequence. These violations were ongoing and specifically documented on June 18, 2001, June 28, 2001, August 16, 2001, and September 11, 2001. For these violations, Env-C 603.02(b)(2) authorizes a fine of \$1,250 per violation. For these violations, the Division is seeking a fine of \$5,000.

2. R. L. Spencer has violated RSA 485-A:17 and Env-Ws 415.09(i) by failing to install adequate erosion control measures on the Property. For this violation, the Division is seeking a fine of \$1,250 pursuant to Env-C 603.02(b)(2).

3. R. L. Spencer has violated NH RSA 485-A:17 and Env-Ws 415.09(j) by failing to stabilize areas within the Property. For this violation, the Division is seeking a fine of \$1,250 pursuant to Env-C 603.02(b)(2).

4. R. L. Spencer has violated NH RSA 485-A:13 by discharging waste to the surface waters of the state without obtaining a permit from DES to do so. For this violation, Env-C 603.05(a) authorizes a fine of \$2,000 per hour or portion thereof that the wastes are discharged. For the nine-hour discharge on June 18, 2001, the Division is seeking a fine of \$18,000.

5. R. L. Spencer has violated Env-Wm 1703.11(b) by causing turbidity in the Wetlands of more than 10 NTUs over background. For this violation, the Division is seeking a fine of \$2,000 pursuant to Env-C 603.08(c).

**The total fine being sought is \$27,500.**

#### **V. Required Response, Opportunity for Hearing**

**Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than March 22, 2002 using the enclosed (colored) form.**

1. If R. L. Spencer would like to have a hearing, please sign the appearance section of the colored form and return it to James Ballentine, DES Enforcement Paralegal, as noted on the

form. A Notice of Scheduled Hearing will be issued

2. If R. L. Spencer chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.

3. If R. L. Spencer wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to Mr. Ballentine and call Mr. Ballentine to indicate R. L. Spencer's interest in settling.

R. L. Spencer is not required to be represented by an attorney. If R. L. Spencer chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

## **VI. Determination of Liability for Administrative Fines**

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that R. L. Spencer committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that R. L. Spencer committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that R. L. Spencer proves, by a preponderance of the evidence, applies in this case:**

1. The violation was a one-time or non-continuing violation, **and** R. L. Spencer did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** R. L. Spencer did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, R. L. Spencer was making a good faith effort to comply with the requirement that was violated.
3. R. L. Spencer has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to R. L. Spencer's case which was not known to the Division at the time the fine was proposed.

\*\*\*\*\***IMPORTANT NOTICE**\*\*\*\*\*

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that R. L. Spencer committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is R. L. Spencer's opportunity to present testimony and evidence that R. L. Spencer did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If R. L. Spencer has any evidence, such as photographs, business records or other documents, that R. L. Spencer believes show that R. L. Spencer did not commit the violation(s) or that otherwise support R. L. Spencer's position, R. L. Spencer should bring the evidence to the hearing. R. L. Spencer may also bring witnesses (other people) to the hearing to testify on R. L. Spencer's behalf.

If R. L. Spencer wishes to have an informal meeting to discuss the issues, R. L. Spencer must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

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Information regarding this proposed fine may be made available to the public via the DES Web page ([www.state.nh.us.des](http://www.state.nh.us.des)). If R. L. Spencer has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

  
**COPY**  
Harry T. Stewart, P.E., Director  
Water Division

Certified Mail/RRR #7000 0600 0023 9936 2762

Enclosure (*NHDES Fact Sheet #CO-2001*)

cc: Gretchen Rule, DES Legal Unit  
Susan Alexant, DES Hearings & Rules Attorney  
Ridge Mauck, DES Water Division  
Andrew O'Sullivan, DES Water Division  
Jennifer Patterson, DOJ/EPB  
Marjory Swope, NHACC  
City of Rochester Mayor and City Council  
Rochester Conservation Commission  
Home Depot USA, Inc.  
Gove Environmental Services, Inc.  
Paul Ford, Ford Construction